No. 15393

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DAVID DIAMOND, etc., and FREEDA DIAMOND, etc.,

Appellees.

APPELLANT'S REPLY BRIEF.

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I.

The Omission of Appellant to File With the Complaints Affidavits Showing Good Cause Did Not Render the Complaints Fatally Defective.

Appellees' argument implies that appellant is seeking to establish a rule of law governing the time when affidavits showing good cause in future cases must be filed. (Br. 4, 7. 9.)[1] This, however, is not true. Undoubtedly,

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[1]"Br." indicates reference to Appellees' Brief. "R." refers to the printed Transcript of Record.

On page 4 of their Brief, appellees state: ". . . the appellant now contends that 'prerequisite to the initiation of such proceedings' means 'post-requisite' to the initiation of denaturalization proceedings." And on page 7: ". . . appellant's theory that the affidavits may be filed at any time renders the affidavit requirement meaningless . . ." Again, on page 9: ". . . to agree with appellant's contention that the affidavits may be filed at any time . . . would create administrative problems for the courts." Appellant submits that a decision in its favor on the facts of the instant appeals would create no future administrative problems.

as a result of the decision of the Supreme Court in *United States v. Zucca,* 351 U. S. 91 (1956), affidavits showing good cause will be filed with all future complaints for denaturalization. It is the position of appellant that the Supreme Court in *Zucca* did not intend that a suit for denaturalization, which was in the status of the instant cases when its decision was rendered, should be dismissed merely because an affidavit showing good cause was not filed with the original complaint. The position of appellant is based upon the *facts of the cases at bar.*

In the present cases, the complaints were filed on November 1, 1954. [R. 3-19.] At that time affidavits showing good cause as to both appellees were in the possession of the United States Attorney. [R. 124-125.] Appellees' motions to dismiss the complaints because the affidavits had not been filed were denied by the District Court [R. 21, 23] upon the authority of *Schwinn v. United States,* 112 F. 2d 74, 75-76 (C. C. A. 9, 1940), affirmed 311 U. S. 616 [R. 36], *then a binding precedent.* Trial commenced on February 28, 1956; and on the opening day of trial, affidavits showing good cause relating to both appellees were received in evidence [R. 123-127, Exs. 1 and 16], and counsel for appellees were served with a copy the next day. [R. 238-239.] When the Supreme Court on April 30, 1956 rendered its decision in *Zucca,* trial was almost completed, the Government having presented all of its evidence and rested its case. [R. 402, 419-421.]

Under such circumstances, did the Supreme Court by its decision in *Zucca* intend that the present actions be dismissed and new actions commenced? Appellant believes not on the following grounds: (1) the requirement that an affidavit showing good cause be filed is procedural

rather than jurisdictional; (2) the defect, if any, arising from appellant's initial omission to file the affidavits was thereafter cured; (3) appellees were in no way prejudiced through appellant's initial omission to file the affidavits.

In addition to those cases cited in Appellant's Opening Brief[2] (pp. 9-10), other district court cases have held that failure to file the affidavit with the original complaint is not fatal. (*United States v. Ercole,* 148 Fed. Supp. 481 (E. D. N. Y., 1957); *United States v. Davis,* 149 Fed. Supp. 249 (E. D. Mich., 1957); *United States v. George Kiros,* E. D. Mich., Dec. 31, 1956—opinion not reported; *United States v. Salvatore Laurenti* (N. D. Ohio, Jan. 15, 1957—no opinion.)

In *United States v. Davis, supra,* the court, after an analysis of the *Zucca* opinion, concluded (p. 251):

> "* * * We, therefore, think the only fair interpretation to be that the affidavit must be filed in order for the suit to be 'maintained,' and that the failure to file an existing affidavit (which is the case here) at the time of commencement of suit *is not a jurisdictional defect but is a procedural one which may be cured."* (Emphasis added.)

It may be conceded, as appellees contend (Br. 10), that in the district court cases relied upon by appellant, the affidavits were filed prior to trial. However, those cases clearly hold that failure to file the affidavit with the original complaint is procedural rather than jurisdictional and is not *ipso facto* fatal. If this Court finds that the

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[2]The following cases were cited in Appellant's Opening Brief as not being reported (pp. 9-10): *United States v. Costello,* 142 Fed. Supp. 290 (S. D. N. Y., 1956); *United States v. Costello,* 142 Fed. Supp. 325 (S. D. N. Y., 1955).

affidavit requirement is procedural, the decision of the Court below should be reversed, since its order of dismissal was based upon the premise that the affidavit requirement was jurisdictional and that the initial omission to file rendered the proceedings void *ab initio.* [R. 36-39.][3] For this reason the District Court did not pass upon appellant's contention that the original defect, if any, had been cured. [R. 37.]

II.

The Defect, If Any, Arising From Appellant's Omission to File Affidavits Showing Good Cause With the Complaints Could Be, and Was Thereafter Cured.

Appellees urge that appellant's "argument implies that appellant feels that the complaint should at least be dismissed conditionally—until a proper affidavit is filed giving appellees sufficient time to test its sufficiency." (Br. 4.) Appellant's argument is subject to no such interpretation. It is the position of appellant that the instant actions should not have been dismissed at all. The defect, if any, arising from the initial omission to file affidavits showing good cause could be and was thereafter cured by the receipt of the affidavits in evidence during trial and the production by the Government of evidence during trial, which not only showed good cause for instituting the suits, but established the allegations of the complaints by clear, convincing, and unequivocal evidence. (See pp. 11-16, Appellant's Op. Br.) These two bases for curer operated alternatively as well as cumulatively. Since appellees were

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[3]This Court may consider the Opinion of the District Court in order to determine the basis of its decision (*Mar Gong v. Brownell,* 209 F. 2d 448, 450 (C. A. 9, 1954)).

were in no way prejudiced by the fact that the affidavits were not filed with the original complaints (See pp. 17-18 of Appellant's Op. Br. and discussion in Part III, *infra*), no grounds existed even for a conditional dismissal.

III.

Appellees Were in No Way Prejudiced Through Appellant's Omission to File Affidavits Showing Good Cause With the Complaints.

Appellees contend that having "been denied the right to test the sufficiency of the affidavit prior to trial, appellees were subjected to suit without any preliminary showing by appellant that appellees' certificates of citizenship might properly have been denied at the time they were granted." (Br. 7.) However, they point to no substantial right which was thereby prejudiced. In view of the evidence adduced during trial, appellees certainly are in no position to claim that their "reputation" was "tarnished" and their "standing in the community damaged" without justification. (*United States v. Zucca,* 351 U. S. 91, 99 (1956); Br. 5.)

Nor were appellees prejudiced by their inability to test the sufficiency of the affidavits prior to trial. The affidavits received in evidence during trial were sufficient. (*Novak v. United States,* 238 F. 2d 282, 283 (C. A. 6, 1956); *United States v. Davis,* 149 Fed. Supp. 249, 250 (E. D. Mich., 1957); *United States v. Costello,* 142 Fed. Supp. 290, 291-293 (S. D. N. Y., 1956); *United States v. Costello,* 142 Fed. Supp. 325, 326 (S. D. N. Y., 1956).) Appellees suffered no injury merely because they did not get "two chances at the Government's case." (*United States v. Zucca,* 351 U. S. 91, 103 (1956) (dissenting opinion); Br. 7), in view of the fact that good cause for

instituting denaturalization suits against them was shown during trial.

Appellees also urge that the "affidavits were not attached to the complaints in the instant cases in order to 'reduce the ordinary chance of discovery rules being employed . . .'" (Br. 8.) This contention is refuted by a comparison of the affidavits showing good cause [Exs. 1 and 16] with the complaints. [R. 3-19.] All of the essential information contained in the affidavits was also set forth in the complaints. Thus, appellees were not deprived of effective use of discovery procedures, nor of any motions or hearings which might have resulted therefrom. Even if it be assumed, as appellees contend (Br. 9), that they were entitled to 60 days to examine the affidavits, they were in no way prejudiced.

Appellees cannot contend that any of the evidence produced during trial was *obtained* in violation of their statutory or constitutional guaranties; consequently their attempted analogy between the introduction of illegally obtained evidence and the introduction by the Government of evidence at the trial of the instant cases (Br. 8-9) must fail.

Respectfully submitted,

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